UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

SHANDS JACKSONVILLE MEDICAL CENTER, INC.	)	
	)	
Respondent,	)	
	)	
And	)	12-CA-26649
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 79, AFL-CIO,	)	
	)	
And	)	12-CA-27197
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1328,	)	
	)	
And	)	
	)	
DELLA HIGGINBOTHAM, an Individual,	)	12-CA-26829
	)	
Charging Parties	)	

RESPONDENT'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF

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STATEMENT OF CASE

This case arises out of unfair labor practice charges filed by American Federation of State, County, and Municipal Employees, Council 79 and Local 1328, (collectively the "Union"), alleging that Respondent violated sections 8(a)(1) and (3) of the Act in certain respects. The Acting Regional Director issued a Consolidated Complaint on November 29, 2011. Respondent filed a timely Answer, denying the material allegations of the Consolidated Complaint and asserting certain affirmative defenses. On April 18, 2012, Respondent filed an Amended Answer. This matter was heard in Jacksonville, Florida on April 22, 23, and 24, 2012 before Administrative Law Judge Ira Sandron. During the course of the hearing, the parties reached a private settlement agreement respecting charge number 12-CA-27197 (Jacqueline Cangro), which was approved by the ALJ on April 23, 2012. (Resp. Exh. 1).[1] The remaining charges were not settled.

On July 3, 2012, ALJ Sandron issued his Decision finding a single violation of section 8(a)(1) of the Act based on an overly broad no-distribution rule. (JD 16: 6-40). [2] ALJ Sandron dismissed on credibility grounds an allegation that Respondent had violated section 8(a)(1) by threatening to go after an employee's nursing license if she pursued a grievance. (JD 16: 1-4). [3] He further dismissed the allegation that Respondent had violated sections 8(a)(3) and (1) by discharging Mishaun Palmer, finding that deferral to an arbitrator's award that had reinstated

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[1] References to the transcript are designated as "Tr." followed by the appropriate page number(s). References to exhibits are designated either as "Resp." or "GC" Exh., followed by the appropriate exhibit number(s). References to Judge Sandron's Decision are designated as "JD" followed by the appropriate page and line numbers. References to the acting General Counsel's Brief are designated as "GC Brief" followed by the appropriate page number(s).

[2] Respondent has filed a cross-exception to this finding.

[3] Judge Sandron inadvertently referred to Greg Williams as "Mitchell."

Palmer without backpay or interim seniority accrual was warranted. (JD 13-15). On July 31, 2012, the Acting General Counsel filed exceptions to the ALJ's decision to defer and his dismissal of the allegations regarding Palmer's discharge, along with a supporting brief. The Acting General Counsel did not file exceptions to the judge's dismissal of the alleged threat to employee Della Higginbotham.

Respondent has this day filed separate cross-exceptions, which are addressed in its brief supporting those cross exceptions. Respondent now files this Answering Brief addressing the contentions raised by the Acting General Counsel. As shown herein, ALJ Sandron properly deferred to the arbitration award.

STATEMENT OF FACTS

Respondent operates an acute-care hospital in Jacksonville, Florida. For many years, the Union has been recognized by Respondent as the exclusive bargaining representative of two separate bargaining units of Respondent's employees, a professional unit and a non-professional unit. Respondent and the Union were parties to a collective bargaining agreement, effective by its terms from September 10, 2009 through June 30, 2012. This agreement contained a grievance/arbitration procedure that culminated in final and binding arbitration. (Resp. Exh. 35, pp. 16-18).

Mishaun Palmer was employed as a Financial Representative within the non-professional unit represented by the Union until her termination on February 12, 2010. (Resp. Exh. 2). At the time of her termination, Palmer was employed in the Pre-Admissions Department. The incident that triggered the investigation that concluded with Palmer's termination involved Palmer's alleged distribution of a Union flyer to three co-workers in a work area during working time. The incident was investigated by Dan Kurmaskie, Director of Admissions. A timely grievance was

filed over the termination of Palmer, and the grievance was processed without resolution through the contractual grievance process. (Resp. Exh. 3).

On February 25, 2010, the Union filed its unfair labor practice charge in Case No. 12-CA-26649. In material part, this charge alleged that Palmer's termination was in violation of sections 8(a)(3) and (1) of the Act. By letter dated April 23, 2010, the Regional Director administratively deferred this charge to the contractual arbitration process under *Collyer Insulated Wire,* 192 NLRB 837 (1971). (Resp. Exh. 4). The Regional Director explained:

> 2. The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.
>
> 3. The Employer notified this office in writing on March 23, 2010, that it is willing to process a grievance(s) concerning the above allegations in the charge, and will arbitrate the grievance(s) if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
>
> 4. Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that the allegations may be resolved through the grievance/arbitration procedure.

(Resp. Exh. 4, p. 2).

The parties selected Richard H. Potter as their arbitrator, and on November 10, 2010, Respondent and the Union participated in a hearing before Arbitrator Potter at which sworn testimony was presented. A transcript of that hearing was prepared, (Resp. Exh. 5), and the Acting General Counsel concedes that the proceedings were fair and regular and that the parties agreed to be bound. (GC Brief at 32). Both parties submitted post-hearing briefs to the arbitrator. (Resp. Exhs. 28, 29).

On February 3, 2011, Arbitrator Potter issued his ten-page Award, along with a cover letter. (Resp. Exh. 30). It is this Award and Arbitrator Potter's findings that are pertinent. [4] In material part, Arbitrator Potter found and/or concluded the following:

1. Arbitrator Potter discredited Palmer on the central factual dispute: whether she distributed a four-page Union flyer (Resp. Exh. 9) in a work area between the hours of 3:00 p.m. and 4:00 p.m. on Thursday February 4, 2010. Three of Palmer's co-workers (Ethel Overstreet, Sharnee Thomas, and Vivian Griffin), all Union members at the time, testified before Arbitrator Potter that Palmer did in fact distribute the flyer on that date and at that time. Palmer, however, despite pointed questioning from Arbitrator Potter noting that either the three co-workers were "lying" or Palmer was "lying," (Resp. Exh. 5, pp. 195-196) adamantly denied this allegation, while admitting only that she distributed the flyer outside the facility prior to work on the morning of February 5. On this issue, Arbitrator Potter opined:

> However, at the hearing, [Palmer] did deny handing out the flyers to the three employees on the 4th. She said the flyers were in a bag at her desk and that the only thing she could think of is that someone must have come to her desk and taken the flyers when she was away. In response to questions from the Arbitrator as to why the three employees might lie about her and possibly get her fired, she replied that she thought it was because they resented the amount of time she spent on Union business. That three Union members would lie about a Steward and possibly get her fired simply because they believed she spent too much time on Union duties is beyond belief. The three seemed credible and provided testimony that appeared impartial. Indeed, although testifying for the Hospital, they provided testimony that, in part, supported the Grievant. Accepting their testimony as credible, it can only be concluded that the Grievant distributed the flyer to the three other Financial Representatives

[4] *See Aramark Services, Inc.,* 344 NLRB 549, n. 1 (2005) (Board based analysis on arbitrator's findings of fact; "The judge incorrectly rejected the arbitrator's credibility findings and substituted his own.") The proper approach would have been to stipulate the facts based on the entire arbitration record and to conduct the applicable legal analysis based on that record. *See Cone Mills Corp. (Marie Darr),* 298 NLRB 661 (1990) (stipulated facts). The General Counsel, however, declined to stipulate, and the testimony that was offered was largely redundant of that which was offered in the arbitration hearing.

> on February 4. Since no investigation was made to determine if she also distributed them to a wider audience before clocking in on the 5th, it is assumed that she did.

(Resp. Exh. 30, pp. 10-11).

2. It was "very common for employees to solicit funds for schools and church drives, sell such things as Girl Scout cookies or candy and magazines for school drives and to sell other things as well." (Resp. Exh. 30, p. 6).

3. After Dan Kurmaskie became Director of Admissions, he became aware that the solicitation policy was not being followed and began to enforce it. But in doing so, he did not "send out a memo or make a general announcement that henceforth the policy would be enforced, but rather approached each individual as he became aware that they were violating the policy." Kurmaskie "had not told [Palmer] of the change in the enforcement of the Policy, and there was no evidence that anyone else had informed her." (Resp. Exh. 30, p. 7).

4. "An employer may begin enforcing a policy that has not been enforced, but to do so, it must make a general announcement, preferably in writing, that in the future the policy or rule will be strictly enforced. In the instant case, that announcement was not made." (Resp. Exh. 30, p. 7).

5. Although Kurmaskie and Staifer "believed the material [Palmer] distributed was calling for employees to take action and that it called for work stoppages or strikes in violation of Article 3 of the Agreement," this view was not shared by the employees who received the flyer. Rather, they were merely confused and/or angered by the message. Further, Respondent did not attempt to stop the distribution of the flyer outside the facility. (Resp. Exh. 30, p. 8).

6. The "what if" questions in the flyer are best interpreted "as an attempt, however inartful, of saying that the employees are essential to the Hospital" and "[i]n summary, the document does not call for a job action in violation of Article 3." (Resp. Exh. 30, p. 8).

7. Although Article 7 of the Agreement, which requires Union officials to clock in to the Union Business cost code center, refers only to grievance handling, "from the testimony of both Hospital and Union witnesses, it is generally accepted that the Union Business cost code is for any Union activity." (Resp. Exh. 30, p. 9).

8. Personal conversations take place in most offices, including Respondent's Admissions department. The distribution of the fliers took only "a few seconds" and no evidence was offered to show "that this incidental casual type of conversation was of the nature" that required clocking in and out of the Union Business cost center. (Resp. Exh. 30, p. 10).

9. "Perhaps the most serious charge made against [Palmer] was that of lying, both in person and in a written statement. In the days following receipt of the flyer, Kurmanskie [sic] investigated by talking to the three employees who received it and to the Grievant. Following each conversation, he asked each to provide a written statement." (Resp. Exh. 30, p. 10).

10. "In [Grievant's written statement], she states that Kurmanskie [sic] asked her to write a statement that she distributed the flyer on the 4th, and goes on to state that she distributed it on the 5th and on the 4th she was busy working on her scheduled duties. In other words, she doesn't deny that she handed tout the flyers on the 4th, but simply that she handed them out on the 5th." (Resp. Exh. 30, p. 10).

11. "In concluding that she handed out the flyers to the three Financial Representatives on the 4th, it is clear that she misled Kurmanskie [sic] by omission when he questioned her as well as in her written statement and lied under oath at the hearing. Although it

could be argued that the written statement isn't technically a violation of Class III, # 26 'Falsification of time attendance, payroll or other Shands Jacksonville record,' lying is a very serious offense." (Resp. Exh. 30, p. 11).

Based on these findings and conclusions, Arbitrator Potter issued the following AWARD:

> The Grievance is granted in part and denied in part. The Grievant shall be returned to work, but without back pay and without receiving credit for time lost for seniority, vacation or sick leave purposes.

(Resp. Exh. 30, p. 11).

Following receipt of Arbitrator Potter's Award, by letter dated February 9, 2011, Counsel for Respondent requested certain clarification from Arbitrator Potter:

> We understand from the Award that the Employer is to return Ms. Palmer to work without back pay or credit for time lost for seniority, vacation or sick leave purposes. The Employer presumed that you intended to downgrade the level of discipline issued to Ms. Palmer. However, in an effort to assure that we have not misread your Award, we would be most appreciative if you would confirm for us whether your intent was to overturn the termination and have the Employer record a lesser level of discipline. In contrast, it is the Union's position that there should be no discipline reflected in Ms. Palmer's personnel file. In addition, the parties seek clarification from you regarding Ms. Palmer's employment status for the past year; specifically, how should the Employer reflect the past year in Ms. Palmer's personnel file, as well as Ms. Palmer's date of hire?

(Resp. Exh. 31).

By letter dated February 11, 2011, Arbitrator Potter indicated that he could not respond, absent a joint request. (Resp. Exh. 32). By e-mail dated February 11, 2011, Union Counsel advised Arbitrator Potter that the parties were making a joint request for clarification. (Resp. Exh. 33). By letter dated February 11, 2011, Arbitrator Potter provided the requested clarification:

> In the award dated February 3, 2011, I found that Ms. Palmer did not violate the prohibition against solicitation and distribution or the

> prohibition against inciting or promoting a job action or work stoppage. However, I did find she lied by omission in a written statement and in an interview with her supervisor, as well as by commission under oath at the hearing.
>
> Although I didn't uphold the discharge, I believe returning her to work after almost a year without backpay is a severe penalty. Indeed, although it isn't explicitly a suspension, it has the same impact. I believe a designation such as "lost time as a result of discipline" correctly describes her status.

(Resp. Exh. 34).

Pursuant to Arbitrator Potter's Award, Respondent reinstated Palmer on February 21, 2011. No backpay has been paid. Palmer remained employed at the time of the unfair labor practice hearing.

STATEMENT OF ISSUES

1. Whether Judge Sandron properly deferred to Arbitrator Potter's Award regarding the termination of Mishaun Palmer under the *Spielberg/Olin* doctrine?

2. Whether the Board should, as requested by the Acting General Counsel, modify the *Spielberg/Olin* doctrine, and, if so, whether under any such revised standard, the Board should defer to Arbitrator Potter's award?

ARGUMENT

A. The Board Should Adopt The ALJ's Decision To Defer Under *Spielberg/Olin* To Arbitrator Potter's Award.

Although the Acting General Counsel argues at length that Respondent unlawfully discharged Palmer and seeks to have the Board address this issue before considering the deferral issue, (GC Brief at 15-31), this would invert the process. The Board does not first determine the merits of the unfair labor practice allegations and then contrast that determination with the arbitrator's award. *Texaco, Inc.,* 279 NLRB 1259, 1259 (1986). Instead, the Board analyzes the

arbitrator's decision on its face in accordance with its decisions in *Spielberg Manufacturing Corp.,* 112 NLRB 1080 (1955) and *Olin Corp.,* 268 NLRB 573 (1984). If the Board determines that deferral is appropriate, it dismisses the charge without ever deciding whether it would have reached a different result than the arbitrator. Here, because deferral is clearly appropriate, the ALJ properly declined to determine the merits and the Acting General Counsel's lengthy argument on the merits need not be addressed.

In *Spielberg,* the Board stated that in order to facilitate "the desirable objective of encouraging the voluntary settlement of labor disputes," it would defer to arbitral awards when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." 112 NLRB at 1082. Following some meandering back and forth regarding the necessity for the arbitrator to have explicitly considered the statutory issue and the proper assignment of the burden of proof, the Board announced in *Olin* that:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.
>
> Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

268 NLRB at 574.

In *Olin,* the Board agreed with criticism leveled by the United States Court of Appeals for the Ninth Circuit in *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352, 354-355 (9th Cir. 1979) regarding "[o]verzealous dissection of opinions by the NLRB, as well as by courts," and with the court's observation that:

> If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act. Nor can it be said that such an award was "palpably wrong," . . . . The reasoning, if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the "hospitable acceptance" necessary if "complete effectuation of the Federal policy is to be achieved." [citations omitted].

Olin at 575 and n. 11. *See also, NLRB v. Pincus Brothers, Inc.,* 620 F.2d 367, 377 (3d Cir. 1980) ("where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator.")

"The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues such as that involved here." *Kvaerner Philadelphia Shipyard, Inc.,* 347 NLRB No. 36 (2006). Thus, the burden of a party opposing deferral has been characterized as a "heavy" one. *Aramark Services, Inc.,* 344 NLRB 549, 550 (2005).

In his brief, the Acting General Counsel acknowledges that the arbitration proceedings were fair and regular and that the parties agreed to be bound. (GC Brief at 32). His contentions are two-fold. First, the Acting General Counsel contends that Arbitrator Potter "was not presented with and did not consider the unfair labor practice issue." (GC Brief at 32-34). Second, the Acting General Counsel contends that Arbitrator Potter's award "is clearly repugnant to purposes and policies of the Act." (GC Brief at 35-41). As Judge Sandron found, neither contention has merit.

1. The Statutory Issue Was Adequately Considered.

Although Arbitrator Potter did not expressly discuss the unfair labor practice allegation in terms of section 8(a)(1), *Spielberg/Olin* does not require such legalese.[5] All that is required is that the contractual issue be "factually parallel" to the unfair labor practice issue and that the arbitrator be "presented generally with the facts relevant to resolving the unfair labor practice." Both of these criteria are clearly satisfied. As to the former, both the contractual issue ("just cause") and the statutory issue ("union discrimination") turned on the nature of Palmer's conduct, whether it was in violation of the contract or established rules, and the consistency of Respondent's enforcement of such rules and policies. Arbitrator Potter discredited Palmer and specifically found that she did in fact distribute the flyer during work time and in a work area and that she did so without clocking into the Union cost center. Nevertheless, he essentially agreed with the Union that the interference with work was de minimis and that the solicitation policy/rules had not been consistently enforced prior to Kurmaskie's arrival. Thus, he found that "Palmer did not violate the prohibition against solicitation and distribution or the prohibition against inciting or promoting a job action or work stoppage" (Resp. Exh. 34) and that her union activity (distribution of flyer) did not provide "just cause" for her termination. This is the precise type of analysis the Board would apply if it were determining the unfair labor practice issue de novo. As Judge Sandron concluded:

> Here, the arbitrator considered all of the circumstances surrounding Palmer's distribution of the flyer, the Respondent's subsequent investigation, and the Respondent's proffered reasons for her discharge.

(JD 13: 48; 14: 1-2).

[5] Arbitrator Potter clearly recognized that an unfair labor practice issue was involved, as he sent a copy of his Award to the Regional Director. (Resp. Exh. 30).

The Acting General Counsel, however, contends that the arbitrator did not consider the unfair labor practice issue because:

> (1) the arbitrator was not presented with, and did not consider the question as to whether the discharge of Palmer was unlawful because it was premised on Respondent's overly broad no distribution rule; (2) the arbitrator was not presented with, and did not consider, the question as to whether the discharge was unlawful under the *Double Eagle* lines of cases, whether or not she distributed flyers during work time or in work areas; (3) the Union did not contend that Palmer was discharged for her union activity and the parties did not litigate that issue before the arbitrator; and (4) the arbitrator did not consider whether Respondent's asserted reasons for discharging Palmer were pretextual, or whether Respondent would have discharged Palmer if she had not engaged in union activity.

(GC Brief 33).

These arguments are diversionary red herrings and wholly without merit. They might have arguable merit if Arbitrator Potter had upheld Palmer's discharge, or denied her backpay and benefits, based on her distribution of the Union flyers. But he found that the rule was inconsistently applied and that no meaningful violation of the distribution rule occurred. He further found that the flyer did not seek to induce a job action or violate the contractual no-strike clause. Thus, Arbitrator Potter ruled in favor of Palmer and the Union completely on the flyer-distribution issue. These conclusions effectively render moot any questions regarding the facial validity of the distribution policy and the *Double Eagle* line of cases. Further, the Union contended, Respondent conceded, and the arbitrator was well aware, that Palmer's union activity (distribution of the Union flyer) was a basis for her termination. The Acting General Counsel concedes as much by arguing in regard to the merits that "a *Wright Line* analysis is not necessary in this case because the conduct for which Respondent claims to have discharged Palmer was union activity." (GC Brief at 18). Indeed, it was her distribution of a Union flyer that triggered the entire investigation. The issue before Arbitrator Potter was whether this union activity was

unprotected (subject to discipline) because of timing, location, or other factors, or because it violated contractual provisions. He found that these activities did not provide a basis for discipline or any remedial penalty. In these circumstances, it is clear that the statutory and contractual issues were factually parallel, that the facts were fully explored in the arbitration, and that the arbitrator ruled in favor of the Union and Palmer (and by extension the Acting General Counsel) on all of these questions. Thus, the Acting General Counsel's contentions are much ado about nothing.

The cases cited by the Acting General Counsel are easily distinguishable. In *M & G Convoy, Inc.,* 287 NLRB 1140 (1988), the General Counsel alleged that the employee's termination was motivated by the employee's protected concerted activities and his prior filing of an unfair labor practice charge, thus violating §§ 8(a)(4), (3), and (1). The employer, however, contended that the employee was discharged for seeking and receiving payment for non-driving time while on personal business. A mere eleven days after his discharge, a joint panel upheld his discharge. During the hearing, there was no mention at all regarding the employee's prior concerted activities and only a perfunctory reference to his prior unfair labor practice charge. Rather, the panel only evaluated whether the reason asserted by the employer constituted just cause for termination. In these circumstances, because the panel had not been presented with the facts relevant to the statutory issue and because § 8(a)(4) issues are not normally deferred, the Board decided the unfair labor practice charge on its merits.

Similarly, in *Dick Gidron Cadillac, Inc.,* 287 NLRB 1107 (1988), the arbitration hearing—which was held less than thirty days after the employee's termination—focused exclusively on whether the employee had violated the employer's discount purchase policy. No evidence was presented regarding the employee's prior activities as a union steward or a warning

that had been given before the employee's termination that he would be discharged soon because of his testimony in an earlier arbitration proceeding. In these circumstances, the Board found that there was no factual parallelism and that deferral was inappropriate.

Unlike these two cases, the arbitration proceeding and the unfair labor practice proceeding both focused on Palmer's union activity, i.e., her distribution of a Union leaflet in a work area and during working time. Unlike these two cases, the evidence presented in both proceedings was almost identical. Unlike these two cases, the Regional Director explicitly deferred the unfair labor practice charge to the arbitrator and the arbitrator was expressly aware of the charge and its significance. Indeed, the arbitrator copied the Regional Director on his decision. Unlike these two cases, the arbitrator specifically found that the union activities in question were not a lawful basis for Palmer's discharge. The Acting General Counsel's contention that the statutory issue was not adequately considered is patently without merit.

2. <u>The Arbitrator's Award Is Not Clearly Repugnant To The Act.</u>

The Acting General Counsel's contentions as to why Arbitrator Potter's award is clearly repugnant to the Act are equally without merit. Indeed, they border on the frivolous. All of the decisions cited by the Acting General Counsel involve situations in which the arbitrator's denial of a particular remedy was on its face based on the employee's statutorily protected activity.

In *Cone Mills Corp.,* 298 NLRB 661 (1990), a case the Acting General Counsel relies upon heavily, the employee (Darr) was discharged following her leadership role in circulating a petition protesting the discharge of three union stewards and her protest of, and refusal to comply with, the employer's break schedule. Darr's supervisor confiscated the petition and refused Darr's request to return it. He then suspended Darr for not following the break schedule, and instructed her to go home and contact the department head the next day. Darr, however, refused

to leave. The department head subsequently discharged Darr for failing to comply with the break schedule and for insubordination in refusing to leave the plant as instructed by her supervisor. The discharge proceeded to arbitration, where the arbitrator found:

> This charge and suspension arose out of the Grievant's efforts to process a complaint under the Labor Agreement and not just a fifteen minute deviation from the scheduled break time. The Company offered no evidence to show the fifteen minute deviation either interfered with operations or was an inappropriate time for a grievance meeting. In fact, the evidence shows all of the Spooler employees at the meeting were on their break time to avoid any interruption in production. Under these circumstances, the Grievant failed to seek permission for union activity time and, if she had requested such time, it could not have been withheld unreasonably under the practices at this plant.
>
> The Overseer's instructions for the Grievant to leave the plant is another matter. Even though the Overseer's suspension was improper at the time, the Grievant was obligated to leave the plant. She failed to follow a direct order of her Overseer. This misconduct was insubordination under the just cause doctrine in the Labor Agreement.
>
> Under the just cause doctrine, discipline must be appropriate for the proven offenses. The Grievant had received a prior written warning for leaving her department without permission. In this case, she has committed a similar offense as well as insubordination. *At the same time the Company's Overseer, pursuant to his Department Head's instructions, curtailed and stifled the Grievant and her fellow employees while they were engaging in protected activity. The Overseer's conduct and accusations contributed to and provoked the Grievant's insubordination.* A sustaining of the discharge in this case would leave employees with no assurance that their agreement would protect them when they engaged in concerted activity. At the same time, an award of back pay would provide supervisors with little assurance that their instructions would be obeyed by employees. This Grievant must recognize and accept managerial authority and use the grievance procedure to resolve private contract disputes. Under the just cause doctrine this Arbitrator has concluded the Grievant should be reinstated without back pay. This award is consistent with the common law of the shop and numerous reported arbitration cases.

298 NLRB at 663. (Emphasis supplied).

The Regional Director refused to defer, and before the ALJ, the parties stipulated the facts as those set out in the arbitrator's opinion and award. The ALJ declined to defer on the ground that the award was repugnant to the Act, but the Board initially reversed, finding that the arbitrator's decision was not "palpably wrong." *Cone Mills,* 273 NLRB 1515 (1985). Following review and remand by the United States Court of Appeals for the D.C. Circuit, *Darr v. NLRB,* 801 F.2d 1404 (D.C. Cir. 1986), the full Board reversed its prior decision. In doing so, however, the Board emphasized that it was "not ruling or implying that the Board would automatically refuse to defer in all situations involving arbitration awards that provide incomplete make-whole remedies, or remedies not otherwise totally consistent with Board precedent," but that it was refusing to defer because "the arbitrator's award is not susceptible to *any* interpretation consistent with the Act." 298 NLRB at n. 19. In finding the arbitrator's award to be repugnant to the Act, the Board relied upon the arbitrator's own findings and the reasons he gave for denying backpay. The Board explained:

> The arbitrator's decision is inherently inconsistent. Most importantly, the arbitrator's conclusion that Darr's refusal to leave the plant constituted insubordination warranting disciplinary action simply cannot be reconciled with his findings that that conduct was provoked by the Respondent's own wrongful actions and was condoned by the Respondent. Given those findings, the conclusion is inescapable that the refusal to leave the plant cannot properly be the basis for discipline.
>
> Thus, we find nothing in the arbitrator's opinion and award that provides a rational basis for the Respondent's discharging Darr, apart from her union activities, or that recounts misconduct that would justify withholding her backpay. Absent such misconduct, the arbitrator's refusal to award Darr backpay has the effect of penalizing Darr for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act. Consequently, the award is clearly repugnant to the Act and we shall not defer to it.

Id. at 666-667.

It was not the denial of backpay itself that rendered the arbitrator's award repugnant to the Act; it was that the basis for the denial of backpay was not independent of Darr's activities that the arbitrator had found to be protected. Similarly, in *Mobil Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176 (1997), *enf'd* 200 F.3d 230 (5th Cir. 1999), the Board declined to defer because the arbitrator upheld the employee's discharge on the grounds that the employee's protected activity constituted insubordination. In *Garland Coal & Mining Co.,* 276 NLRB 963 (1985), the arbitrator reduced the employee's termination to a three-week suspension based on the "insubordinate" nature of the employee's protected activity. In *Key Food Stores Cooperative, Inc.,* 286 NLRB 1056 (1987), the arbitrator explicitly relied on the employee's post-discharge picketing and internal union activities, which were protected under the Act. In *Consolidated Freightways,* 290 NLRB 771 (1988), *enf'd,* 892 F.2d 1052 (D.C. Cir. 1989) the arbitrator denied backpay on the basis of activity which both he and the Board found to be protected.

Thus, in all of these cases, the Board looked at the face of the arbitrator's decision to see if his denial of a remedy (either in whole or in part) was based on activity protected by the Act. The fact that the employee engaged in some type of protected activity did not by itself render the arbitrator's award clearly repugnant to the Act. Rather, it was the arbitrator's linking of the penalty to the protected conduct that was dispositive.

On the other hand, when the arbitrator's denial of full relief is based on grounds that are independent of the protected activity and thus not repugnant to the Act, the Board routinely defers. Indeed, to do otherwise would usurp the arbitrator's authority and undermine the arbitration process. In *Combustion Engineering, Inc.,* 272 NLRB 215, 217 (1984), the Board deferred to an arbitrator's award reinstating the employee, but denying backpay for the six-month period the employee was out of work, because the arbitrator "denied backpay on an

independent ground that was not repugnant to the Act—Bennett's obdurate attitude toward improving his attendance." Thus, "[t]he arbitrator's remedy, though perhaps different from what the Board would have ordered de novo, is reasonably based and is susceptible to an interpretation consistent with Board policy." *Id.* The Board elaborated:

> As *Olin Corp.* suggests, the Board's decision whether to defer to an arbitration award does not hinge on whether we would reach the same result de novo. Rather, our concern is to ensure that the decision does not impinge upon the parties' rights under the Act. In this case, we find that [the employee's] rights were preserved by his reinstatement, and the arbitration award is not invalidated by the arbitrator's decision not to award backpay since this remedy was based on a factor that is not inconsistent with the Act.

Id. at 216-217.

Regarding the arbitrator's discretion to select a remedy, the Board noted:

> We believe that the flexibility of remedies is a major advantage of arbitration. Industrial peace is more likely to result from awards tailored to specific circumstances than those applied mechanically to diverse situations.

Id. at n. 11.

The Board, in *Combustion Engineering,* adopted the analysis of the court in *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352 (9th Cir. 1979). In that case, the arbitrator denied backpay for two reasons: (1) The employee's pattern of abusive conduct and (2) The employee's refusal to agree to a settlement worked out by the employer and the union. The parties jointly requested clarification and the arbitrator clarified that each reason was independent and sufficient in itself to deny backpay. In these circumstances, the court held that although the second reason cited by the arbitrator was clearly repugnant to the Act, the first reason was independent of the second and not repugnant to the Act. Thus, deferral was required. The court, citing back to the Supreme Court's decision in *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597

(1960), where the Court made it clear that mere ambiguity was an insufficient reason to decline to enforce an arbitration award, further noted that even without the arbitrator's clarification, deferral was required:

> Indeed, even if there had been no proper clarification, the ambiguous original decision should itself have been accorded deference. If the reasoning behind an award is susceptible to two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act. Nor can it be said that such an award was "palpably wrong." [citation omitted] The reasoning, if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the "hospitable acceptance" necessary if "complete effectuation of the Federal policy is to be achieved."

Id. at 354. *See also, Derr & Gruenewald Construction Co.,* 315 NLRB 266, 273 (1994) (following *Combustion Engineering* and deferring to award that was less than what Board remedy would provide); *Texaco, Inc.,* 279 NLRB 1259 (1986) (deferring to arbitration award that ordered reinstatement without backpay of two employees discharged for alleged strike misconduct.)

Here, it is beyond dispute that the Arbitrator's denial of backpay and interim seniority accrual was wholly unrelated to any protected activity by Palmer and was based on independent grounds that are not repugnant to the Act. Specifically, the Arbitrator based the limited remedy, which he characterized as a "penalty," on his finding that "Palmer lied by omission in a written statement and in an interview with her supervisor, as well as by commission under oath at the hearing." It cannot be seriously contended that perjury during an arbitration hearing, or lying to the employer during its investigation of possible misconduct, constitutes protected conduct. Indeed, as the Supreme Court has recognized, "[f]alse testimony in a formal proceeding is intolerable" and "a 'flagrant affront' to the truth-seeking function of adversary proceedings." *ABF Freight System, Inc. v. NLRB,* 510 U.S. 317, 323 (1994). "Perjury should be severely

sanctioned in appropriate cases." *Id.* Most certainly, an arbitrator has the power and discretion to control the hearing held before him and to penalize perjured testimony.

It is also well settled that the Act does not foreclose the Board from withholding a remedy to an unlawfully discharged employee if that employee perjures herself before the Board. Thus, the Board would be within its statutory authority to adopt a rule precluding a perjurer "from profiting from the proceeding, or it might even have adopted a flat rule precluding reinstatement when a former employee so testifies." *Id.* Section 10(c) of the Act grants the Board wide discretion in fashioning an appropriate remedy and explicitly authorizes it to withhold backpay if to do so will "effectuate the policies" of the Act. "Although reinstatement and backpay are the usual remedies when an employee has been unlawfully discharged, the Board has, at times, decided not to grant those remedies where doing so would not effectuate the policies of the Act." *Precoat Metals,* 341 NLRB 1137, 1138 (2004). One such circumstance is when the employee in issue gives material false testimony before the Board. In such cases, the Board typically denies reinstatement (if the employee has not previously been reinstated) and tolls backpay as of the date of the employee's materially false testimony. *Id., First Transit, Inc.,* 350 NLRB 825 (2007); *Toll Mfg. Co.,* 341 NLRB 832, 835-836 (2004).

If the Board is free to deny reinstatement and backpay as a penalty for giving perjured testimony before the Board, it surely follows that Arbitrator Potter was free to reinstate Palmer without backpay as a penalty for perjuring herself before him. The Acting General Counsel's contention that Arbitrator Potter did not find "that Palmer perjured herself by willfully testifying to something she believed to be false" (GC Brief at 38-39) is factually inaccurate. Arbitrator Potter did not merely discredit Palmer's testimony; he found that she consciously lied. Having confronted her with the observation that either the other employees were lying or she was lying,

Palmer maintained her position that she did not do what she was accused of doing. The question asked of Palmer was not open to subjective interpretation or mere shading or exaggeration of the facts; rather, it concerned an objective fact for which the answer was either "yes" or "no." There simply was no middle ground for confusion or obfuscation. While the arbitrator did not use the term "perjury," that is precisely what he found. That is apparent from the entire tenor of his Award. The notion that Arbitrator Potter denied Palmer backpay because of inadvertently inaccurate testimony is beyond belief.

The Acting General Counsel further contends that the "arbitrator's substitution of his own rationale for the punishment of Palmer for the rationales of Respondent, which the arbitrator rejected, is clearly repugnant to the Act in the circumstances of this case." (GC Brief at 37). This argument has no legal basis. It was the arbitrator's, not Respondent's, judgment that the parties bargained for regarding the appropriate remedy, if any. If the Acting General Counsel is trying to say that Respondent did not discharge Palmer because she perjured herself at the arbitration hearing, that is true inasmuch as the arbitration hearing had not even occurred at the time of Palmer's discharge. But that merely confirms the independent nature of the arbitrator's basis for denying backpay and interim seniority. It had nothing to do with any protected activity by Palmer. If the Acting General Counsel is trying to say that the arbitrator could not consider anything that happened post-termination or at the arbitration hearing in fashioning a remedy, that is a proposition without any legal support. The Supreme Court has made clear that arbitrators have wide discretion in formulating remedies:

> Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel,* for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in

> order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" 363 U.S., at 597, 80 S.Ct., at 1361 (emphasis added).

United Paperworkers International Union v. Misco, 484 U.S. 29, 41 (1987).

The Board itself will look at post-termination misconduct in fashioning a remedy. *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990) ("we would be granting an undue windfall if we failed to take into account [the employee's post-termination] misconduct and granted him reinstatement and full backpay"); *enf'd,* 681 F.2d 11 (D.C. Cir. 1982). The Acting General Counsel argues that Palmer's false testimony was not on a "central issue" and that the Board thus would not have denied backpay. (GC Brief at 39). Again, this is factually inaccurate. The major factual dispute at both the arbitration hearing and the unfair labor practice hearing was whether Palmer distributed the Union flyer between the hours of 3:00 pm and 4:00 pm on February 4. In the face of testimony from three co-workers that she did distribute the flyer, Palmer adamantly insisted that she did not do so. This was also a central legal question for the arbitrator inasmuch as the timing and location of the activity were important. Palmer readily acknowledged that she distributed the flyer on the morning of February 5, in non-work areas and during non-work time, but denied doing so on the afternoon of February 4. This denial was potentially crucial to Palmer's defense, although the arbitrator ultimately ruled in her favor despite discrediting her. But even if the issue could somehow be deemed non-central, it still would not render the award repugnant to the Act. As Judge Sandron noted:

> Granted, the deprivation of a year's backpay and benefits is a harsh punishment. However, as the above cases reflect, my role is not to serve as an appellate arbitrator, review the award de novo, or substitute my judgment of what penalty, if any, Arbitrator Potter should have imposed on Palmer for what he deemed her perjury. To do so would undermine the strong public policy in favor of alternative dispute resolution and the parties' agreement to be bound by the decision of the arbitrator whom they mutually selected.

(JD 15: 37-43).

Arbitrator Potter also denied Palmer backpay and interim seniority because she lied to Kurmaskie during his internal investigation, both in person and in her written statement. This too was a reason unrelated to any protected conduct. The Acting General Counsel argues extensively that the termination notice did not address Palmer's deception to Kurmaskie in her interview with him and that this was a post-hoc rationalization reached during the arbitration hearing in order to support the deferral argument. (GC Brief at 25-29). This contention is illogical, factually unsupported, and legally immaterial. Respondent had no reason at the arbitration hearing to believe that the Board would not defer to Arbitrator Potter's Award and no reason to create any new defense. The Regional Director had deferred under *Collyer* and Respondent would have needed supreme clairvoyance to know how Arbitrator Potter would eventually rule. Factually, the termination notice specifically referred to Palmer's "signed statement" given to Kurmaskie, which clearly constitutes "other Shands Jacksonville records" under Class III, Rule 26. There is nothing in Respondent's position statement or in Kurmaskie's testimony at Palmer's unemployment hearing that is even remotely inconsistent. But, in any event, the defense that Palmer lied to Kurmaskie was clearly raised before Arbitrator Potter, and Arbitrator Potter relied upon it, in conjunction with Palmer's perjury at the arbitration proceeding, to deny Palmer certain remedies. It is not the province of the Board to second guess Arbitrator Potter's determination.

If either of the reasons relied upon by Arbitrator Potter for denying backpay is separate and independent of protected activity, the Award is susceptible to an interpretation that is not repugnant to the Act. To repeat, the issue is not whether the Board *would* have denied backpay had it been sitting in Arbitrator Potter's chair, but whether Arbitrator Potter's award is

susceptible to an interpretation that is consistent with the Act. It clearly is, and deferral is required under existing precedent.

The Acting General Counsel further contends that Kurmaskie unlawfully interrogated Palmer regarding her distribution of the Union flyer on February 4 and from this contention he posits that "Palmer's response (i.e. alleged lie) to Respondent's coercive questioning about her protected activity is a natural and logical outgrowth and continuation of her protected activity and is itself protected." (GC Brief at 37-38). This contention also lacks merit. It appeared at the unfair labor practice hearing that the Acting General Counsel was seeking to elicit testimony aimed at establishing that in questioning Palmer, Kurmaskie failed to comply with *Johnnie's Poultry, Co.*, 146 NLRB 770 (1964), *enforcement den. other grounds,* 344 F.2d 617 (8th Cir. 1965), by not advising Palmer that she was not required to participate in the interview or answer questions regarding her union activity. The ALJ properly cut off this questioning because the Consolidated Complaint contained no allegation that Kurmaskie violated the Act in his interview of Palmer. The Acting General Counsel did not request to amend the Complaint, and in any event, this allegation is not supported by any charge and is barred by section 10(b) of the Act. Thus this theory was neither pled nor fully litigated and cannot constitute a valid basis for refusing to defer. Further, the theory on its face, even if it could be considered, lacks any legal merit. It is not the correctness of the arbitrator's award that is at issue; it is whether the award is susceptible to any lawful interpretation. If it is, the Board will defer. Moreover, there is nothing in the *Johnnie's Poultry* decision that suggests that an employer does not have a right to question an employee as part of a lawful investigation into possible misconduct, even when that misconduct occurs during union activity. The *Johnnie's Poultry* warnings have no application outside the context of questions asked by an employer in preparation of its defenses to an unfair

labor practice proceeding. *Spartan Plastics,* 269 NLRB 546, 546 (1984). Further, under the basic interrogation analysis set out in *Rossmore House,* 269 NLRB 1176 (1984), *enf'd,* 760 F.2d 1006 (9th Cir. 1985), the Board has held that an employer does not engage in unlawful interrogation when as part of a legitimate investigation into alleged employee misconduct occurring during union activity, it questions an employee about such misconduct, at least so long as the employer's questions focus on the arguable misconduct. *Bridgestone Firestone South Carolina,* 350 NLRB 526, 528-529 (2007) (employer lawfully interrogated employee while investigating employee's alleged use of profanity while engaging in union-related discussion). Here, Kurmaskie had a legitimate basis for investigating whether Palmer distributed a union flyer during work time and in a work area without clocking into the union business cost center. During the meeting, Palmer was represented by Union President Cangro. Significantly, Kurmaskie's questions focused solely on whether Palmer distributed the flyer between 3:00 and 4:00 pm on the specific day in question. Although Palmer attempted to divert the focus to her distribution of the flyer during non-work time and in a non-work area on the following day, Kurmaskie did not pursue that issue and (along with Cangro) refocused on the day and time that was in issue. There was no contention by either Palmer or Cangro that Kurmaskie's questions were coercive. (Tr. 178-179, 342-343).

The Acting General Counsel's reliance on *United Services Automobile Association,* 340 NLRB 784, 786 (2003), *enf'd,* 387 F.3d 908 (D.C. Cir. 2004) is misplaced. In that case, the employees were unrepresented, and the employer suspected (based on security camera) that the employee had anonymously placed flyers on employees' desks at night when other employees were not even in the facility. Despite the absence of any plausible issue requiring investigation, and the employee's assertion that she did not want to answer questions concerning the flyers, the

employer's manager questioned her for more than an hour. The employer also questioned a second employee who was not even involved in the distribution of the flyers. In these circumstances, the Board reasonably found the questioning to be coercive.

The Acting General Counsel's interrogation theory is frivolous. Finally, even if the Board could somehow invalidate Arbitrator Potter's reliance upon Palmer's lie to Kurmaskie, this would not justify Palmer's perjury before Arbitrator Potter. And since this reason is beyond dispute unrelated to any protected activity by Palmer, deferral is required.

3. Conclusion

For all of the reasons discussed above, the Board should adopt the ALJ's decision to defer to Arbitrator Potter's Award.

B. The Board Should Decline To Modify *Spielberg/Olin.*

The Acting General Counsel's request to modify the *Spielberg/Olin* analysis should be rejected by the Board. This contention is based on the Acting General Counsel's memorandum (GC Memo 11-05) announcing that he intends to ask the Board to adopt a new approach regarding post-arbitration deferral to arbitration awards:

> Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.
>
> Further, we will urge the Board to change Olin's allocation of the burden of proof for deferral. We believe that the party urging deferral should have the burden of showing that the deferral standards articulated above have been met. This will ensure that the statutory issues have indeed been considered by the arbitrator, as well as encourage parties seeking deferral to establish an evidentiary record that will give the Board a sounder basis for reviewing arbitral awards and deciding whether to defer. Thus, the party urging deferral must demonstrate that: (1) the

> contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's decision or award is not susceptible to an interpretation consistent with the Act. Such a framework would provide greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining.

Spielberg/Olin, however, represents an appropriate accommodation of the Act's varying goals. The Acting General Counsel has offered no compelling reason to modify these longstanding principles. There has been no showing that the Board's current policy inadequately protects employees' statutory rights. Further, insofar as the Acting General Counsel seeks to require arbitrators to affirmatively enunciate and apply the statutory principles, such a requirement would inject unnecessary legalism into what is a less formalistic proceeding. It would also be contrary to well-accepted judicial precedent that mere legal error does not warrant rejection of an arbitration award. "Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Misco, supra,* at 38.

Even if the Board should decide at some point that the *Spielberg/Olin* standard should be modified in certain respects, any such changes should not affect this case. First, it would be patently unfair to apply any such changes retroactively or to this case. The Acting General Counsel seeks only to modify the steps that the parties and arbitrators must follow in order to ensure that the statutory issue is considered. He does not seek to alter the substantive standard for deferral, i.e., clear repugnance to the Act. Here, the Regional Director initially deferred under *Collyer,* and the parties and Arbitrator Potter litigated the case in anticipation that the Board

would follow existing precedent. Changing the procedural prerequisites after the fact would deny the parties basic due process and would create "ill effects" that can be avoided by prospective application. *See Levitz Furniture Co.,* 333 NLRB 717, 729 (2001) (applying new standard for withdrawal of recognition prospectively). Second, as discussed above, the Acting General Counsel's "failure to adequately consider" argument has been rendered irrelevant by Arbitrator Potter's conclusion that there was no meaningful violation of Respondent's distribution rule and no violation of the contractual no-strike clause. His denial of backpay and certain benefits was premised entirely on misconduct by Palmer that was unrelated to the activity that Arbitrator Potter found to be protected.

C. The Board Should Adopt The ALJ's Dismissal Of The Allegations Regarding Mishaun Palmer.

Because deferral is appropriate, there is no need for the Board to address the Acting General Counsel's arguments regarding the merits. Respondent, however, strongly disputes the Acting General Counsel's contentions that Respondent harbored animus toward the Union and that her termination violated sections 8(a)(3) and (1) of the Act. Respondent acknowledged that the "working relationship" between Respondent and the Union in the nonprofessional unit was not good, but a poor working relationship is not equivalent to legal animus. The record contains no evidence that Respondent was responsible for the poor working relationship. Respondent's judgment regarding the seriousness of certain of the offenses underlying Palmer's termination, in particular the distribution of the flyer and the intent/meaning of the flyer, was rejected by the arbitrator (as was his prerogative), but there is no question that Kurmaskie, who was the effective decision maker, honestly believed that these were serious violations of the contract and established policy and that they warranted termination. Further, as Arbitrator Potter explicitly

found, Palmer lied during the investigation and lying is a serious offense. In these circumstances, no violation of the Act can be established.

CONCLUSION

WHEREFORE Respondent requests that the Board adopt Judge Sandron's decision to defer to Arbitrator Potter's Award and to dismiss the allegations regarding Mishaun Palmer.

Respectfully submitted this 14th day of August 2012.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing ANSWERING BRIEF by electronic mail on the following parties:

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This the 14th day of August 2012.

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